

Rooftop Lease Agreements

Keys to Avoid Unintended Results

By Robyn M. North

The increasing demand for cellular and other wireless devices has significantly increased traffic on wireless networks and thus the demand by wireless carriers for the lease of building rooftops, space on cell towers, raw land, and other space suitable for the installation and operation of antennas and related communications equipment. In some locations, the rents generated under lease and license

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agreements for this space can generate revenue comparable to that of leased interior office building space. Although some property owners may view the lease of their underused building, land, or similar space as “free money,” the execution of a carrier’s standard form of agreement with little or no negotiation is a risk that can lead to detrimental and unintended results for the property owner.

This article will highlight some of the key issues for building owners to address when negotiating rooftop licenses or lease agreements. As is the

case with many standard form agreements, rooftop agreements drafted by wireless carriers are often one-sided and may contain (or omit) many provisions that can pose significant risks to a building owner. A risk-adverse owner should review a proposed lease or license agreement (or draft its own) carefully to ensure that the risks associated with rooftop operations are properly allocated to the party in the best position to control the risks. The bargaining power of a building owner depends on many factors, such as the desirability of the site location to the carrier,

John Aquilino, *Afternoon in Baltimore*. Oil on canvas, 2009



the parties' knowledge of the market, whether the lease is an expansion or a new agreement, and the experience of the parties negotiating the transaction. Practically, in most circumstances, the bargaining power favors the property owner because the carrier needs the rooftop use more than the owner needs the associated rent. Careful negotiation by the building owner can further its dual objectives of maximizing revenue and minimizing risk.

What follows are examples of several key provisions contained in standard rooftop lease forms drafted by carriers and used throughout the wireless industry and a discussion of potential issues from the property owner's perspective.

Equipment Space, Description, and Grant of Rights

Standard rooftop agreements drafted by carriers often allow the carrier to install "any and all" equipment at the

site that it deems appropriate for its operations, including "associated" and "ancillary" equipment. The agreement also may establish an express easement in the property and grant the carrier unfettered rights to augment, replace, modify, and upgrade its equipment.

Typical provision:

Landlord hereby leases to Tenant a certain portion of the Property containing approximately _____ square feet and grants such easements as are necessary for the installation of Tenant's communications equipment and all related equipment, cables, accessories, and any other items required or advisable for Tenant's business operations. Tenant has the right to do all work necessary to prepare, add, maintain, and alter Tenant's equipment at the Property for Tenant's communications operations.

Several issues can be detrimental to an owner who grants these broad rights to a wireless carrier. For example, the carrier may be able to assert that it has a perpetual easement or other such right in the property when the nature of the transaction calls only for a landlord-tenant or a licensor-licensee relationship. Although many rooftop agreements are called "licenses," most lawyers realize that they will generally be interpreted as leases because they contain terms and conditions that are similar to those contained in traditional leases—for example, lease terms, renewal options, and defaults and remedies.

Further, this language permits the carrier to install (or later modify) equipment at the property at its sole discretion. This can lead to the installation of heavy, unsightly, or excessive amounts of equipment inappropriate for the property or to the placement of equipment in an area that causes



unreasonable interference with the building or other tenant systems or simply in an area that is not the property owner's preferred location. The owner should require the carrier to provide it with a preliminary scope of work and installation plans, which include specific drawings or photo-simulations, as well as details about the type and proposed location of all equipment being installed, including all ancillary materials, and to describe with particularity the type, weight, quantity, and size of all such proposed equipment.

A building owner should be careful to preserve its right to use, repair, and expand the building, and the carrier should not be allowed to harm or reduce the useful life of the roof or other building elements. It is critical for a building owner, before executing a rooftop lease agreement, to review carefully and consent to the carrier's proposed scope of work. In some cases the owner's ultimate approval may require consultation with a rooftop manager, licensed engineer, or other professional. The carrier's plans may vary as the transaction progresses, but, when finalized by both parties, the approved plan documents should be incorporated into the agreement as exhibits, which will, among other things, limit the carrier's ability to (1) damage the property or structure by installing large antennas or other equipment, (2) block line-of-sight views, or (3) interfere with any future planned renovation or development of all or part of the property. Limiting the carrier's installation rights at the outset of the transaction also will require the carrier to seek future approvals from the property owner for changes to the original installation. The owner can then condition its approval on the execution of an amendment documenting the changes and the payment of additional rent if, for example, additional equipment is installed. Enumerating specific "permitted services" and "prohibited uses" in the agreement also will preserve the property owner's ability to negotiate in good faith for additional rent if the carrier wishes to add new technology and equipment in the future. For many building owners, aesthetics also are an important

consideration, and the parties should agree in advance on the carrier's obligations related to camouflaging, painting, and installing a screening device around its equipment area.

Monetary Obligations

Rents payable under rooftop and cell tower agreements can be structured in many ways, but there are other monetary obligations that should also be addressed, including utilities, taxes, and penalties and interest for late payments.



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Knowing the market helps, because rents fluctuate depending on the demand in the general area, the size and suitability of the property, the availability of other sites in the area, and the alternative and future uses for the site. Standard rooftop agreements can often include terms of 20 to 30 years, which may be structured as a single term, or possibly as multiple five-year terms that permit the rent and other terms to be re-negotiated before the commencement of each renewal period. An annual escalator should be included in any long-term lease to account for inflation and other economic factors. The carrier may want to delay the commencement of rent until it has obtained all necessary permits and completes the installation. A property owner should insist, however, that rent commences on the execution of the agreement, as the future conditions may never occur,

and, in any event, the space bargained for by the carrier is being reserved for it by the owner.

Access

Most carriers insist on the ability to access their equipment on an unlimited, 24-hour-per-day, seven-day-per-week basis, but there are legitimate reasons why a landlord should limit the carrier's access to its property.

Typical provision:

At all times throughout the term of this Agreement, and at no additional charge to Tenant, Tenant and its employees, agents, licensees, and subcontractors will have 24-hour-per-day, seven-day-per-week access to and over the Property, for the installation, inspection, upgrade, maintenance, repair, replacement, modification, expansion, and operation of Tenant's equipment and any utilities serving the Premises. Landlord grants an easement for such access and if Landlord fails to provide the access granted in this Agreement, such failure shall be a default under this Agreement and Landlord will pay Tenant, as liquidated damages and not as a penalty, \$_____ per day in consideration of Tenant's damages until Landlord cures its default.

In the case of an office building, an owner concerned with the integrity of the building may want to have a representative accompany the carrier's personnel in the building, or at least control the carrier's access to the building. In these cases it is reasonable for an owner to require that the carrier provide it with at least 24-hour advance notice for any non-emergency access. Costs also may be incurred by the landlord to provide for the carrier's access outside of normal business hours, including overtime or trip charges by a security guard or other personnel. Consequently, the carrier should agree in advance to reimburse the landlord for its actual costs within a reasonable time of receiving an invoice.

Of course, there may be occasions when the carrier needs access to its space because of an emergency, for

example, when its equipment is malfunctioning or causing interference. It is important to describe those circumstances in the agreement and define what constitutes an “emergency.” Even in the case of an emergency, the carrier should be obligated to contact the building manager while en route to the building. There also may be times when the landlord needs access to the carrier’s space, and this access should be expressly allowed in the agreement.

Approvals/Compliance

Typically, carriers investigate and obtain all approvals required for their operations at a site before the carrier executes the agreement with the property owner. The owner should require the carrier to provide it with copies of all permits and approvals required for the carrier’s operations at the property to satisfy the owner, as well as other users of the property, that the proposed equipment and operations are safe, but the owner should avoid obligating itself beyond assisting the carrier in its approval process.

Typical provision:

Landlord agrees that Tenant’s ability to use the Premises is contingent upon the suitability of the Premises and Tenant’s ability to obtain and maintain all governmental licenses, permits, approvals, or other relief required of or deemed necessary or appropriate by Tenant for its use of the Premises, including without limitation applications for zoning variances or ordinances, amendments, special use permits, and construction permits. Landlord authorizes Tenant to obtain all such approvals for Tenant’s permitted use under this Agreement and agrees to assist Tenant with such applications and with obtaining and maintaining the approvals.

The carrier should be obligated to deliver to the landlord a report from a licensed engineer confirming that the carrier’s plans do not pose any safety threats to occupants or users of the property and that the proposed plans comply with all FCC regulations,

including radio frequency emissions. It is also advisable to include a clause requiring the carrier and its personnel to comply with all current and future law, as well as the requirements of the utility providers and any property association or similar body.

Interference

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the carriers’ equipment. This position is reasonable given that a carrier may expend significant capital at the site. Thus, an owner should require *all* carriers to test and investigate the potential for interference before installing any equipment and should prohibit carriers from installing equipment that can lead to potential interference issues. Including a definition in the agreement of what constitutes interference also is suggested.

Typical provision:

Landlord will provide Tenant, upon execution of the Agreement, with a list of all existing radio frequency user(s) on the Property to allow Tenant to evaluate the potential for interference. If Tenant’s use or

operation on the Property causes interference with any such users, Tenant will cause it to cease within 24 hours after receipt of notice from Landlord. Landlord will not grant, after the date of this Agreement, a lease, license, or any other right to any third party for use of the Property, if such use may in any way adversely affect or interfere with the Tenant’s equipment, the operations of Tenant, or the rights of Tenant under this Agreement. If any such interference occurs, Landlord will cause it to cease within 24 hours after receipt of notice from Tenant.

The agreement should address remedial procedures if interruptions or interferences occur, and the owner should agree to cooperate with the affected parties, rather than assume complete responsibility to resolve the interferences, including intermittent testing by the affected carriers on a schedule approved by the owner. Radio frequency emissions are always a concern, particularly when antennas are located near occupants or users of the property, and a building owner might consider requiring the carrier to report periodically on FCC compliance and negotiating a broad indemnity to cover the cost of defending claims of potential injuries from the equipment’s emissions. An owner that contemplates any future construction, major renovation, or new use of the property should ensure that it has adequately addressed these possibilities in the rooftop agreement and has included procedures for the temporary or permanent relocation of the carrier’s equipment.

Relocation and Restoration

There may be circumstances, contemplated or unforeseen, in which the owner may need to require a carrier to temporarily or permanently relocate its equipment at the building. It might be the building owner’s necessary roof repairs or planned replacement of the roof, or it could be interference issues or safety concerns. The best approach in negotiating a rooftop agreement is usually a team approach, in which the building owner preserves its right to

expand, maintain, and use the property, even if by doing so it is obligated to pay the carrier's reasonable costs of relocating its equipment, and in which the carrier is granted the right to terminate the agreement if the substitute space is substantially less suitable for its operations.

Typical provision:

Landlord has the right, subject to the following provisions and exercisable



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at any time after the first five years of the initial term, but only exercisable one time during the term, and only after providing Tenant with not less than 12 months prior written notice, to relocate any or all of the Tenant's equipment to an alternative location; provided, however, that (i) all costs and expenses associated with or arising out of such relocation (including, without limitation, costs associated with any required zoning approvals and other governmental approvals, costs for tests of the substitute premises, etc.) shall be paid by Landlord; (ii) such relocation will be performed exclusively by Tenant or its agents; (iii) such relocation will not unreasonably result in any interruption of Tenant's operations; and

(iv) such relocation will not impair, or in any manner alter, the quality of services provided by Tenant. Landlord will exercise its relocation right by delivering written notice pursuant to the terms of this Agreement. In the notice, Landlord will identify the proposed relocation premises to which Tenant may relocate its equipment.

If, in Tenant's reasonable judgment, no suitable relocation premises can be found, Landlord may not exercise its relocation right described in this section; provided, however, that if Landlord is exercising its relocation right described in this section in order for Landlord to comply with laws, rules, regulations, or orders applicable to it, and in Tenant's reasonable judgment no suitable relocation premises can be found, Tenant shall have the right to terminate this Agreement upon written notice and without penalty or further obligation.

A building owner should negotiate more favorable terms, such as a 90-day notice for a relocation and no limitation on the number or frequency of relocations. Another critical issue is the carrier's obligation to remove its equipment at the end of the term, usually within a fixed number of days, and to restore the property to its original condition. The agreement should specify that if the carrier does not remove its equipment by the deadline, it will be in holdover and will be obligated to pay holdover rent, for example, between 110% and 300% of the current rent.

Assignment/Subleasing and Co-location

The typical assignment provision in a standard form rooftop agreement allows the carrier to assign its rights under the agreement freely and to sublease or co-locate with other carriers. The building owner should attempt to restrict the carrier's transfer rights and require that a permitted assignee is, at a minimum, creditworthy and in possession of all required licenses and approvals.

Typical provision:

Upon written notice to Landlord, Tenant will have the right to assign this Agreement or sublease or co-locate upon the Premises, or any portion thereof, and its rights herein, in whole or in part, without Landlord's consent. Upon notification to Landlord of such assignment, Tenant will be relieved of all future performance, liabilities, and obligations under this Agreement to the extent of such assignment.

"Co-location" refers to situations in which multiple carriers occupy a single pole, mount, or tower. In many cases, co-location is a preferred method of minimizing the number of antennas and other equipment at a site. It is important, however, for a building owner to negotiate a clause that limits the carrier's right to add other co-location carriers without the payment of a "co-locating" fee, which can be a percentage of the amount paid to the carrier or a percentage of the rent paid to the building owner. This is an issue frequently overlooked by property owners at a potential cost of double or triple the amount of the initial revenue under the agreement. There are several ways to draft the agreement if the carrier will not agree, but the point is the agreement should be structured to include the owner's right to collect additional revenue, regardless of whether a subsequent lessee leases the space from the building owner or the original lessee.

Insurance and Indemnities

Most form agreements include a provision requiring the carrier to carry insurance, but often the requirements do not go far enough to protect the building owner. The agreement should require liability and property insurance in sufficient amounts (and the ability of the property owner to increase the amounts over the term of the agreement), should limit the amount of the deductible, and should establish other minimum requirements—for example, the use of rated insurance carriers and "additional insured" status to the building owner under all required policies.

If the carrier self-insures (as many large carriers do), the agreement should include additional conditions, such as commercially reasonable limits, an adequate claim management process, creditworthiness, and a limit on the amount that can be self-insured (for example, the self-insured amount may not exceed 10% of tenant's net worth as computed in accordance with generally accepted accounting principles).

Similarly, contractual indemnities are among the most important components of a rooftop agreement. Standard rooftop agreements often do not adequately impose the indemnity obligations on the party in the best position to control the risks, that is, the carriers, who are in the business of operating communications networks. It is reasonable for a building owner to expect the carrier to indemnify it, as well as its heirs, assigns, and agents, against damage and injury resulting from the carrier's use of the property, including the release of hazardous materials on the property. Most standard forms contain mutual indemnity obligations that are not adequately tailored to address the specific relationship of the parties.

Typical provision:

During the term, Tenant will carry, at its own cost and expense, the following insurance: (i) Special Form ("All Risk") property replacement for its property; (ii) Workers' Compensation Insurance as required by law; and (iii) commercial general liability (CGL) insurance with respect to its activities on the Property, such insurance to afford minimum protection of One Million Dollars combined single limit, per occurrence and in the aggregate, providing coverage for bodily injury and property damage. Notwithstanding the foregoing, Tenant shall have the right to self-insure against the risks for which Tenant is required to insure against in this Section. In the event Tenant elects to self-insure any coverages under those policies in which it is obligated to include Landlord as an additional insured, the following provisions shall apply: (1) Landlord shall promptly and no later

than seven days after notice thereof provide Tenant with written notice of any claim, demand, lawsuit or the like for which it seeks coverage pursuant to this section and provide Tenant with copies of any demands, notices, summonses, or legal papers received in connection with such claim, demand lawsuit, or the like; (2) Landlord shall not settle any such claim, demand, lawsuit, or the like without the prior written consent of Tenant; (3) Landlord shall fully cooperate with Tenant in the defense of the claim, demand, lawsuit or the like; (4) Tenant's self-insurance obligation for Landlord shall not extend to claims for punitive damages, exemplary damages, or gross negligence; and (5) such obligations shall not apply when the claim or liability arises from the negligent or intentional act or omission of Landlord, its employees, agents, or independent contractors.

A building owner should take care to draft insurance and indemnity clauses that are broad enough to meet the owner's expectation of protection by requiring adequate amounts and types of coverages, as well as the ability to increase coverages during the (typically, lengthy) term of the lease. The owner also should limit the amount of the carrier's deductible in order to flush out self-insurance situations, in which the owner may want to impose additional conditions.

Termination

Carriers often include unilateral early termination provisions in their standard forms, but building owners should consider limiting the termination rights to situations that are outside the carriers' control, for example, the inability to maintain a required license, and requiring the payment of an early termination fee.

Typical provision:

This Agreement may be terminated by Tenant upon written notice to Landlord, for any reason or no reason, so long as Tenant pays Landlord a termination fee equal to two

months' Rent at the current rate, provided, however, that no termination fee will be payable on account of condemnation, casualty, or severability of this Agreement.

Depending on the circumstances, a building owner may want to negotiate for mutual termination rights or a larger termination fee.



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Conclusion

Space that is suitable for communications operations should be viewed by property owners as a potentially valuable asset, but with the understanding that there are inherent risks associated with these operations, such as potentially dangerous levels of radio frequency emissions, property damage, personal injury, contamination, and interference with building systems or other tenants. Although this article is not a comprehensive account of all the relevant issues in a transaction with a wireless carrier for the lease of space for communications operations, it is intended as a helpful checklist for use when negotiating an agreement for a property owner that can ultimately lead to a win-win situation for the owner and the wireless carrier. ■